

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

**Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600**

Case No. A-6389

PETITION OF JOHN POWERS
(Hearing held September 12, 2012)

OPINION OF THE BOARD
(Effective date of Opinion, October 5, 2012)

This proceeding is a petition pursuant to Section 59-A-4.41 of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1994, as amended) for variances from Sections 59-C-1.326(1)(3)(A) and 59-C-1.326(a)(1). The petitioner proposes the construction of an accessory structure/gazebo that requires a variance of 68.50 feet as it is within 11.50 feet of the front lot line and a variance to permit the accessory structure to be located in the front yard. The required front lot line setback is eighty (80) feet and accessory structures are required to be located in the rear yard only.

The subject property is Lot 43, Block D, Sycamore Acres Subdivision, located at 15915 Emory Lane, Rockville, Maryland, 20853, in the RE-1 Zone (Tax Account No. 03581238).

Decision of the Board: Requested variances **granted**.

EVIDENCE PRESENTED TO THE BOARD

1. The petitioner proposes the construction of an 8 x 14 foot accessory structure/gazebo in the western front yard.
2. The petitioner testified that the proposed structure will be used as shelter for his disabled child. The record includes a letter from Dr. Jeffrey P. Rabin, which states: "Samuel Liang is an 18 year old male with spastic quadriplegic cerebral palsy. . . . It is my determination that given his medical conditions and for his safety, he needs an enclosed space to wait for his school bus. He uses a posterior walker for short distance ambulation. When he waits for the bus, he must sit and be shielded from inclement weather." See Exhibit Nos. 3(b) [letter from Jeffrey Rabin dated 7/12/2012] and 4 [site plan].

3. The petitioner testified that his house is located more than 165 feet from the road and that if the proposed structure were located elsewhere on the property it would not be of use to his son. The petitioner testified that the property's rear yard is very steeply sloped. The petitioner testified that he owns the adjoining Lots 12 and 14. See Exhibit No. 7 [zoning vicinity map].

STANDARDS FOR EVALUATION

Based upon the petitioner's binding testimony and the evidence of record, the Board finds as follows:

The requested variances do not comply with the applicable standards and requirements of the Montgomery County Zoning Ordinance set forth in Section 59-G-3.1. However, the Board finds that the variances can be granted as a reasonable accommodation of the petitioner's child's disability under Title II of the Americans With Disabilities Act (ADA) and the Fair Housing Amendments Act of 1988 (FHAA) provisions.

Determination of Disability

The ADA and FHAA define a person's disability, or handicap, in pertinent part, as "a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual." 42 U.S.C.A. §12102(2)(A); 42 U.S.C. §3602(h).

Whether an individual has an impairment and whether the impairment substantially limits a major life activity is to be determined on a case-by-case basis. *Dadian v. Village of Wilmette*, 269 F.3d 831, 837 (7th Cir. 2001) (citations omitted).

Prohibition on Housing Discrimination Based on Disability

The FHAA and Title II of the ADA prohibit housing discrimination based on an individual's handicap or disability.

The FHAA prohibits discrimination against "any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling" on the basis of that person's handicap. 42 U.S.C.A. § 3604(f)(2). The FHAA definition of discrimination includes a refusal to make reasonable accommodations in "rules, policies, practices or services when such accommodation may be necessary to afford" a person with a handicap "equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B). A "necessary accommodation" to afford "equal opportunity" under FHAA will be shown where, but for the accommodation, the disabled person seeking the accommodation "will be denied an equal opportunity to enjoy the housing of their choice." [See *Trovato v. City of Manchester, N.H.*, 992 F.Supp. 493, 497 (D.N.H. 1997) (citing *Smith & Lee Assocs. v. City of Taylor*, 102 F3d 781, 795 (6th Cir. 1996).] A failure to make a reasonable accommodation need not be supported by a showing of discriminatory intent. [See *Trovato*, 992 F. Supp. at 497 (citing *Smith*, 102 F.3d at 794-96).]

Reasonable Accommodation by Local Government of an Individual's Disability

The "reasonable accommodation" provision of the FHAA has been interpreted to require municipalities to "change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities." [See *Trovato*, 992 F. Supp. at 497 (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996)).] Similarly, Title II of the ADA (42 U.S.C.A. §12132) has been held to apply to zoning decisions, which constitute an "activity" of a public entity within the meaning of the ADA. [See *Mastandrea v. North*, 361 Md. 107, 126, 760 A.2d 677, 687, at n. 16 (citing *Trovato*, 992 F.Supp. at 497).]

Under the ADA, a local jurisdiction is required to reasonably modify its policies when necessary to avoid discrimination on the basis of disability, unless it is shown that the modifications "would fundamentally alter the nature of the service, program or activity." 28 C.F.R. §35.130(b)(7) (1997). Therefore, unless the proposed accommodation would "fundamentally alter or subvert the purposes" of the zoning ordinance, the variance must be granted under Title II of the ADA. [See *Trovato*, 992 F.Supp. at 499.]

Findings of the Board

Based on the above, the Board must make the following findings:

1. Determination of disability: An evaluation of whether a disability exists under the ADA or FHAA requires a three-step analysis. The applicant's medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the applicant relies must be identified (i.e. walking, independent mobility) and the Board must determine whether it constitutes a major life activity under the ADA and FHAA. Third, the analysis demands an examination of whether the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).
2. Non-discrimination in housing: The Board must find that the proposed variance constitutes a reasonable accommodation of existing rules or policies necessary to afford a disabled individual equal opportunity to use and enjoy a dwelling.
3. Reasonable modification of local government policies: Because zoning ordinances are among the varieties of local government rules subject to Title II of the ADA and the FHAA, the Board must find that the proposed variance must be granted in order to avoid discrimination on the basis of disability unless the proposed accommodation would fundamentally disrupt the aims of the zoning ordinance.

Applying the above analysis to the requested variance, the Board finds as follows:

1. The Board finds that the multiple medical issues coupled with the need for a posterior walker for short distance ambulation demonstrates that the petitioner's child's major life activities are restricted. Because of the direct impact of these impairments on the petitioner's child's major life activities, the Board finds that a disability exists pursuant to the definitions in the ADA and FHAA. The Board finds that the proposed accessory structure/gazebo would permit the petitioner's child a safe and enclosed space to wait for his school bus.
2. The Board finds that the proposed accessory structure/gazebo will not undermine the intent of the zoning ordinance. Gazebos can generally be commonly found in residential areas such as the RE-1 Zone in which the subject property is located, and are consistent with the intent of the zoning ordinance to promote a residential scale and streetscape in residential zones.

Accordingly, the proposed accessory structure/gazebo will not impair the intent, purpose, and integrity of the general plan affecting the subject property.

Therefore, based upon the petitioner's binding testimony and the evidence of record, the Board finds that the grant of the requested variances are a reasonable accommodation of the petitioner's child's disability because (1) granting the requested variances for this purpose will not fundamentally alter or subvert the purposes of the zoning ordinance; and (2) the proposed gazebo is necessary to permit the petitioner's child a safe and enclosed space to wait for his school bus.

Accordingly, the requested variances of: (a) 68.50 feet from the required eighty (80) foot front lot line setback, and (b) to permit the accessory structure/gazebo to be located in the front yard are **granted** subject to the following conditions:

1. The petitioner shall be bound by all of his testimony and exhibits of record, to the extent that such evidence and representations are identified in the Board's Opinion granting the variance.
2. Construction must be completed according to plans entered in the record as Exhibit Nos. 4 and 5.
3. The variance is granted to the petitioner only. The proposed accessory structure/gazebo shall be removed at such time as it is no longer required to address the petitioner's child's medical condition or the petitioner's child no longer resides in the property.

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the Opinion stated above is adopted as the Resolution required by law as its decision on the above entitled petition.

Board member Walter S. Booth was necessarily absent and did not participate in this Resolution. On a motion by Carolyn J. Shawaker, seconded by Stanley B. Boyd, with David K. Perdue and Catherine G. Titus, Chair, in agreement, the Board adopted the foregoing Resolution.

Catherine G. Titus
Chair, Montgomery County Board of Appeals

I do hereby certify that the foregoing Opinion was officially entered in the Opinion Book of the County Board of Appeals this 5th day of October, 2012.

Katherine Freeman
Executive Director

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have the right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.